Supreme Court, U.S.
FILED
OCT 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5677

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

---

WARREN LEE HARRIS,

*Petitioner,*

v.

MARVIN REED, WARDEN
AND NEIL F. HARTIGAN,
Attorney General of the State of Illinois

*Respondents.*

---

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit**

---

## SUPPLEMENTAL BRIEF OF PETITIONER

---

KIMBALL R. ANDERSON*
GEORGE B. CHRISTENSEN
E. KING POOR
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600
*Counsel for Petitioner*
** Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | i |
| ARGUMENT | 1 |
| CONCLUSION | 3 |


## TABLE OF AUTHORITIES


CASES

*Martinez* v. *Harris*, 675 F.2d 51 (2d Cir. 1982), *cert. denied*, 459 U.S. 849 (1982) ..... 1

*Waterhouse* v. *Rodriguez*, 848 F.2d 375 (2d Cir. 1988) ... 1

STATUTES

*Ill. Rev. Stat.* ch. 38, par. 122-1 *et seq.* (1987) ..... 2

## ARGUMENT

Petitioner calls the Court's attention to the recent decision in *Waterhouse* v. *Rodriguez*, 848 F.2d 375 (2d Cir. 1988), which was decided on June 3, 1988 and which appeared in the advance sheets after Petitioner submitted his Reply Brief to the printer. In *Waterhouse*, the Second Circuit departs somewhat from *Martinez* v. *Harris*, 675 F.2d 51 (2d Cir. 1982), *cert. denied*, 459 U.S. 849 (1982), which is relied on by Respondents in the case *sub judice*. (*See* Br. For Respondents at 14.)

In *Martinez*, the defendant failed to object at trial to a jury instruction. On appeal, the defendant argued for the first time that the instruction violated his constitutional rights. The prosecution argued that the defendant's claim was barred procedurally. The state appellate court affirmed defendant's conviction without opinion. The defendant then filed a petition for writ of habeas corpus in the United States District Court, which dismissed the petition on the ground that defendant's conviction rested on an adequate and independent state ground. The Court of Appeals for the Second Circuit affirmed, stating "we do not believe that the Appellate Division's silence evinces an intent to overlook the procedural error." 675 F.2d at 54.

In *Waterhouse*, the defendant failed to raise ineffective assistance of counsel at either the trial or intermediate appellate court level. On appeal to the state's highest court, the defendant argued for the first time that he had received ineffective assistance of counsel at trial. The prosecutor argued that the defendant had been represented effectively and that, in any event, his claim was barred procedurally. The state court affirmed the defendant's conviction without opinion. The defendant then filed a petition for writ of habeas corpus in the United States District Court which, after a trial on the merits, granted



the petition. On appeal, the Court of Appeals for the Second Circuit considered whether the defendant's procedural default was the basis for the state court's silent affirmance, as follows:

> When the state has urged affirmance of a conviction on procedural grounds as well as on the merits and the state appellate court affirms without opinion, a federal court affirms without opinion, a federal court will generally infer that the state appellate court based its decision upon the Petitioner's procedural default [citing *Martinez*] . . . . However, where a constitutional claim is clearly not subject to procedural forfeiture under state law, an inference that the state appellate court's silence indicates a decision resting on a procedural default rather than a negative view of the merits cannot be justified. Federal habeas review of the merits in such circumstances is not barred. *Hawkins* v. *LeFevre*, 758 F.2d 866, 874 (2d Cir. 1985).
>
> Under New York law, the Court of Appeals will entertain a claim of ineffective assistance of counsel despite the defendant's failure to raise that claim at trial or before the Appellate Division. [Citation omitted.]

As Petitioner noted in his Reply Brief, Illinois appellate courts frequently will entertain a claim of ineffective assistance of counsel in proceedings under the Illinois Post-Conviction Hearing Act, *Ill. Rev. Stat.* ch. 38, par. 122-1 *et seq.* (1987), despite the defendant's failure to raise the claim at trial or on direct appeal. (*See* Reply Br. of Petitioner at 2-4.) In Petitioner's case, the claim was not silently entertained as in *Waterhouse*; it was expressly entertained in a several-page decision concluding with the statements:

> Viewing the defendant's petition and supporting affidavits in light of the record, we do not believe that he

has established that the representation he received at trial resulted in substantial prejudice without which the outcome would probably have been different. Accordingly, we affirm the judgment of the circuit court of Cook Court [sic].

(J.A. at 14.)

## CONCLUSION

Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

KIMBALL R. ANDERSON*
GEORGE B. CHRISTENSEN
E. KING POOR
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600
*Counsel for Petitioner*
* *Counsel of Record*